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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re JOANNA C., a Person Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. LUZ C., Defendant and Appellant.	F046349 (Super. Ct. No. JD102913-00) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Jon E. Stuebbe, Judge.

Gregory M. Chappel, under appointment by the Court of Appeal, for Defendant and Appellant.

B.C. Barmann, Sr., County Counsel, and Jennifer E. Zahry, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Buckley, Acting P.J., Levy, J., and Cornell, J.

Luz C. appeals from an order terminating her parental rights (Welf. & Inst. Code, § 366.26) to her infant daughter.[1] Appellant contends respondent Kern County Department of Human Service (the department) failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901, et seq.) and therefore the court erred by terminating her parental rights. On review, we disagree and will affirm.

PROCEDURAL AND FACTUAL HISTORY

In April 2004, the Kern County Superior Court adjudged appellant's infant daughter a dependent child of the court, removed her from parental custody and denied the parents reunification services. The court previously determined the child came within its jurisdiction under section 300, subdivisions (d) and (j) due to a substantial risk of sexual abuse and neglect. Due to its denial of reunification services, the court set a section 366.26 hearing to select and implement a permanent plan for the child. Although both parents received proper notice of their appellate remedy (§ 366.26, subd. (*l*)) neither challenged the court's decision by filing a notice of intent.

In anticipation of the section 366.26 hearing, the department prepared a written assessment recommending that the court find the child adoptable and terminate parental rights. The department had placed the child with a paternal aunt and her husband who were committed to adopting the child.[2] At an August 2004 hearing, the court found the child adoptable and terminated parental rights.

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Having been placed for adoption with her paternal aunt and thus with part of her extended family, we note the child was in a preferred adoptive placement even under ICWA. (25 U.S.C. § 1915(a).)

DISCUSSION

Background

At the initial hearing in this case, the court inquired of each parent whether either had any Indian heritage. While appellant replied "No," the child's father testified he believed he was eligible to become a member of the Tule Indian tribe. He thought his father then deceased was a member of the tribe. The court in turn asked for the paternal grandfather's full name as well as date and place of birth. According to the reporter's transcript, the father replied "[t]he only thing he was born in 1946 and his name is Shawn Garcia [Q.]." When further asked if he had information regarding who his father's parents were, the witness answered no and that his grandparents has also "passed on." The court thereafter directed that the Bureau of Indian Affairs (BIA) and the tribe be notified.

The department thereafter served copies of the dependency petition, notice of the jurisdictional hearing and a request for confirmation of the child's status as an Indian on each parent, the BIA, and the ICWA representative of the Tule River Reservation. In its request, the department set forth as to the father's family the following: the father's name, date and place of birth and claimed affiliation with the "Tule River Reservation (Mono)," as well as the information the father had disclosed at the detention hearing, although the department reported the name of the child's paternal grandfather was "John Garcia [Q.]" The department also checked boxes marked "UNK" in response to the following questions:

"IS BIRTH FATHER NAMED ON BIRTH CERTIFICATE?,"

"IF NOT, HAS BIRTH FATHER ACKNOWLEDGED PATERNITY?," and

"IF NOT, WAS BIRTH FATHER'S PATERNITY ESTABLISHED?"

Notably, at the time the department completed and mailed its request, the birth father had in fact acknowledged and established paternity. The department also disclosed in an apparent reference to the child that "Birth Certificate unavailable at this time."

Last, in response to questions that might be helpful in tracing Indian ancestry, the department checked boxes marked "No" to the following questions:

> "Is your family a part of an Indian Band?"
>
> "Have you or any members of your family ever received services from the bureau of Indian Affairs?"
>
> "Have you or any members of your family ever: (a) attended an Indian school? (b) Received medical treatment at an Indian health clinic or public health service hospital? (c) Lived in federal trust land, a reservation, or a rancheria?"

According to a form letter response dated, March 10, 2004, the Enrollment Chairperson of the Tule River Tribal Council for the Tule River Indian Reservation (Tule River) acknowledged receipt of the request for membership verification but was unable to determine whether the child was a member or was eligible for membership based on the information provided.

At the jurisdictional hearing held on March 18, 2004, the court referenced the response from Tule River and its inability to determine based on the information provided if the child was either a member of or was eligible for membership in Tule River. County counsel, on behalf of the department, represented to the court her belief that the department had provided Tule River with all the information the department had. At the jurisdictional hearing's conclusion, the court deferred ruling on county counsel's request for a finding that the child was not an Indian.

Consequently, in preparation for an April 16th dispositional hearing, the department served timely notice of that hearing on Tule River. Its social worker also prepared a social study for the court. Relevant to this appeal, the social worker reported the father could not provide her with past family heritage regarding his Indian ancestry.

At the dispositional hearing, county counsel, noting Tule River's response had been unclear, submitted a declaration of an Indian affairs expert regarding the need for out-of-home placement for the child. This was apparently a conscious effort on the

department's part to comply with the dictates of ICWA assuming Tule River were to determine that the child was eligible for tribal membership. Thereafter, in the course of its dispositional findings and orders, the court made requisite ICWA determinations regarding remedial services and for foster care placement of the child. (25 U.S.C. § 1912 (d) &(e).) The court further found that Tule River had received proper notice.

Unbeknownst to the court and the parties, Tule River had made an April 14th determination that the child and the father were not direct lineal descendants of and were ineligible for membership in Tule River. A copy of Tule River's April 14th letter documenting this determination was filed with the court just days after the dispositional hearing.

Then, at the August 2004 termination hearing, county counsel made mention of Tule River's April 14th letter. She also represented "there has been some information from the paternal relatives that they are not part of an Indian – this Indian tribe or any other Indian tribe." Thereafter, the court found, in the process of terminating parental rights, that ICWA did not apply to the child's dependency.

Analysis

As previously mentioned, appellant contends the department failed to comply with ICWA notice requirements. According to appellant, the department: (1) used obsolete forms for giving notice and disclosing the information it had obtained regarding the father's claim of Indian heritage; (2) failed to provide Tule River with a copy of the child's birth certificate; (3) provided insufficient information regarding the father's relatives; (4) reported a questionable first name for the paternal grandfather; (5) never disclosed for the record the extent of its investigation; and (6) erroneously reported that the father's paternity status was unknown.

We find appellant's argument unpersuasive for a variety of reasons. First, at the April 2004 dispositional hearing, the court found Tule River received proper notice of the proceedings. If appellant wished to challenge the sufficiency of the department's efforts

to provide adequate notice, she could and should have challenged the court's dispositional orders by way of writ petition to this court, which she did not. By her inaction, she theoretically waived her right to now complain about notice. (*In re Pedro N.* (1995) 35 Cal.App.4th 183, 189.)

We will assume, for sake of argument however, that the issue was preserved. Because the court also made the necessary factual findings required by ICWA at the dispositional hearing, appellant then could not have shown she was aggrieved for ICWA purposes.

Nevertheless, we conclude having reviewed the record that the only omission worthy of any discussion was the department's checking boxes marked "UNK" or unknown regarding whether the father had acknowledged or established his paternity. In fact the father had established his paternity. In its definitions of terms used in the act, ICWA states:

> "'parent' means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity not been acknowledged or established." (25 U.S.C. § 1903 (1)(9).)

Appellant has failed in her appellate burden to affirmatively show prejudicial error on this record regarding the department's mistake on the paternity issue . (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 471-472 [it is appellant's burden to establish prejudicial error once the tribe expressly indicates no interest in the proceeedigns]; *Calhoun* v. *Hildebrandt* (1964) 230 Cal.App.2d 70, 72.) There is no showing that the department's mistake caused Tule River to reach its ultimate determination that neither the child nor her father was a direct lineal descendant and eligible for tribal membership. Indeed, such alleged prejudice does not logically follow. If in fact Tule River relied on the department's "UNK" answers in reaching its decision, then it does not follow that Tule

River would initially advise the department and the court that it had insufficient information from which to make a membership determination.

To the extent appellant complains the department used obsolete forms, we take judicial notice of the new California State Department of Social Services form SOC 820, which replaced forms SOC 318 and 319 effective January 2004.[3] Nevertheless, having compared the forms and given the very limited information the department could ascertain about the paternal side of the father's family heritage, we conclude the use of the old forms in this case did not undermine the court's finding of proper notice.

As for not providing Tule River with a copy of the child's birth certificate, we note the department reported the birth certificate was unavailable when it gave notice of the proceedings. Also, having reviewed the child's birth certificate, which was corrected to insert her first name, as opposed to "Baby Girl," and filed with the court in the summer of 2004, we note the mother had not named the child's biological father on the birth certificate, thereby making the lack of a birth certificate months earlier a nonissue.

To the extent appellant complains the department provided insufficient information regarding the father's relatives or never disclosed the extent of its investigation, the record is undisputed that the department provided what they had available and there is no record that they could have reasonably uncovered more information which would have led to a different result in this case.

Last, the fact that the department listed the paternal grandfather's first name as "John" while the court reporter at the detention hearing reported the father as testifying his father's first name was "Shawn" did not amount to error on the department's part. We note that the department served the father with a copy of the documentation, which

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[3] We hereby grant appellant's request for judicial notice filed November 10, 2004. (Evid. Code, § 459.)

listed paternal grandfather's first name as "John." We infer from the absence of any complaint by the father that the department properly identified the paternal grandfather.

DISPOSITION

The order terminating parental rights is affirmed.